

file



Before The  
**State Of Wisconsin**  
**DIVISION OF HEARINGS AND APPEALS**

---

Application of Warren Davis, Jr., for a Permit to  
Construct a Solid Pier With "L" Extension on the  
Bed of Green Bay, Village of Ephraim, Door  
County, Wisconsin

---

Case No. 3-LM-96-531  
3-LM-96-532

**FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER**

Warren Davis, Jr., 80 Inverness Court, Lake Bluff, Illinois, 60044, applied to the Department of Natural Resources for a permit to construct a solid pier 80 feet long by 24 feet wide at the bottom and 12 feet wide on the top with a 30 feet long "L" extension on the bed of Green Bay. The proposed permit is located in Government Lot 4, Section 12, Township 31 North, Range 29 East, Village of Ephraim, Door County, Wisconsin.

The Department of Natural Resources issued a Notice of Proposed Solid Pier which stated that unless written objection was made within 30 days of publication of the Notice, the Department might issue a decision on the permit without a hearing. The Department did receive timely objections to the project.

Pursuant to due notice hearing was held at Sturgeon Bay, Wisconsin, on August 16, 1999, at Green Bay on November 16 and 17, 1999, and by video conferencing on December 13, 1999, Jeffrey D. Boldt, administrative law judge (the ALJ) presiding. The parties requested an opportunity to file post-hearing briefs and the last brief was received on February 16, 2000.

In accordance with secs. 227.47 and 227.53(1)(c), Stats., the PARTIES to this proceeding are certified as follows:

Warren Davis, Jr., by

Attorney Waltraud A. Arts  
Quarles & Brady  
P. O. Box 2113  
Madison, WI 53701-2113

Wisconsin Department of Natural Resources, by

Attorney Peter Flaherty  
P. O. Box 7921  
Madison, WI 53707-7921

Kurt Pagel  
1086 Melody Drive  
Green Bay, WI 54303

Zalman Philip Saperstein  
P. O. Box 585  
Sister Bay, WI 54234

#### FINDINGS OF FACT

1. Warren Davis, 80 Inverness Court, Lake Bluff, Illinois, 60044, completed filing an application with the Department of Natural Resources for a permit under sec. 30.12, Stats., to construct a solid pier on the bed of Green Bay, Village of Ephraim, Door County. The Department and the applicants have fulfilled all procedural requirements of secs. 30.12 and 30.03, Stats.
2. The applicants own real property located in the Government Lot 4 in Section 12, Township 31 North, Range 29 East, Door County. The above-described property abuts Green Bay which is navigable in fact at the project site.
3. The applicants propose to construct a solid pier on the bed of Green Bay. The proposed pier is 80 feet long by 24 feet wide at the bottom and 12 feet wide on top with a 30 foot long "L" extension. To allow for the flow of water, there is a bridge-opening approximately 39 feet below the Ordinary Highway Water Mark (OHWM). The proposal also includes the placement of two 24 inch diameter culverts running parallel to shore. The pier would be constructed of rock-filled steel sheeting, stone riprap and cedar outer boards to provide a more natural appearance. Approximately 1000 square feet would be dredged to facilitate mooring of boats at the project site.
4. The purpose of the solid pier is to moor a boat for recreational boating. The applicants currently own a 22 foot boat powered by an outboard motor. This boat is moored at the Ephraim Yacht Club. The applicants have also regularly placed a temporary aluminum pier. The portable pier does not allow the applicants to moor their boat, given the wind and wave action at the project site. The temporary pier does give the applicants access to reach the waters of Green Bay and reasonable access for swimming and other related purposes. The applicants cite their declining health and improving financial situation as factors which motivate them to install a permanent solid pier that would allow them to moor their boat.

5. The shoreline near the project site is a rocky bluff. The applicants own approximately 400 feet of shoreline. The pier would be placed approximately in the center of this riparian zone.

6. The proposed structures will not materially obstruct existing navigation on Green Bay. The pier is 80 feet long and would not obstruct the usual pattern of boat traffic in the area. There is a protruding point of land along the shoreline north of the central Village of Ephram, which takes boats farther out in the water. Further, while it is true that the pier would take kayakers and canoeists out farther from shore, the proposed solid pier is in substantially the same configuration as the temporary pier which the applicants have placed over many years. Under these circumstances, any obstruction to navigation would not be material.

7. The applicants are financially capable of constructing, maintaining, monitoring or removing the structures if it should be found in the public interest to do so.

8. The proposed structures will not reduce the effective flood flow capacity of Green Bay.

9. Numerous witnesses, including Department staff and members of the public, testified that the proposed pier would be detrimental to the public interest in natural scenic beauty. The area of Door County in the Village of Ephraim is renowned for its natural and rocky coastline. Any pier is to some extent an intrusion into the natural landscape. However, in this instance the applicants have proposed a design which contains significant natural elements which make the pier less visually obtrusive than numerous other piers in the area.

The steel sheet piling would have riprap around the outside that would blend with the natural, rocky coast. The cedar planking also mitigates the visual impact of the pier and provides a natural design element.

Further, the Village of Ephraim has adopted a comprehensive Dock Ordinance which established four districts along the shoreline and developed management standards for docks and piers. (Ex. 42, Calkins) Two of the Village Districts are not allowed to place permanent solid docks.

The proposed pier is in District D, which the Village has evaluated as follows:

#### 19.6 DISTRICT D.

District D, from the north side of Anderson Dock through the north end of the Village consists of thousands of feet of open shoreline along which mostly seasonal homes are established. There are more permanent docks in place in this District than elsewhere along the shoreline. Some are in good repair, while others are showing their age. From the water this District has more of a natural, open look, than the other Districts, since the existing residences are well-spaced against a heavily-wooded backdrop. The following requirements are designed to

maintain the natural look of this area from the water to ensure uniformity of design, to permit relatively unimpeded movement of shallow water boats (e.g., canoes and kayaks) along the shoreline, and to protect the littoral zone.

(1) All permanent docks in District D shall be flow-through docks, following the guidelines of the solid piers and docks document provided to us by the DNR (made a part of this ordinance in Appendix A). . . .

The Village Ordinance is not binding upon the DNR or the Division. However, it does reflect a serious effort by the Village to bring consistency to dock placement issues in the Village. The Ordinance also reflects a reasoned and informed judgment about prioritizing and preserving natural scenic beauty concerns in the Village. It is, accordingly, entitled to substantial weight. The proposed design meets the Village Ordinance.

Given the record as a whole, a clear preponderance of the credible evidence indicates that placement of the pier will not be detrimental to the public interest in natural scenic beauty.

10. Placement of the L-shaped solid pier would create an area of still water inside the protected "L" area in a way that a temporary pier would not. While this would facilitate the mooring of boats, creation of a stilling area would have several undesirable environmental consequences. The solid pier would substantially block wave action and long shore littoral currents during common wave height and water conditions. Long shore currents are currents that generally flow parallel to the shore. They are strong enough to move bottom sediment along the shore. This movement is called littoral drift. If the current or drift is interrupted by a solid structure several things can happen. Often, there is a buildup of bottom material on the "updrift" side of the structure causing the water to become shallow. In many instances, erosion is increased "downdrift" of the structure. (Ex. 71)

U.W. Sea Grant Coastal Engineer Phillip Keillor was persuasive that a substantial portion of the littoral zone would be blocked by the solid pier structure, despite the bridge opening. Mr. Keillor made calculations of the estimated blockage of the littoral zone based upon 2 and 4 foot breaking wave height. (Ex. 137-38) These calculations indicate blockage of littoral flow in a range from 15 up to 100 percent. (Exs. 137-138)

Under these circumstances, there is a substantial likelihood that the design of the solid pier will lead to the accumulation of sediment in the protected area. (Rasman) The resulting build-up of sediment would likely require maintenance dredging, resulting in further disturbance of the aquatic environment in the area. This has been the experience of the DNR at other nearby sites. (See: Ex. 30-31; Dupperault) The applicants have not carried their burden of proving that the proposed pier design would not lead to an accumulation of sediment.

11. There was essentially no dispute that the still area inside the "L" of the proposed solid pier would promote the growth of aquatic plants. There was also agreement by experts on both sides that this would facilitate the growth of the undesirable exotic species Eurasian water milfoil (EWM). The experts disagreed about whether EWM could be controlled by hand-harvesting inside the "L" area of the proposed pier. There was further disagreement about the potential seriousness of an increase in EWM in the area.

Drs. Engel, Nichols and Gerber all testified that the stilling area associated with placement of the solid pier would lead to an increase in aquatic plants in the vicinity of the proposed pier. This would include both native and non-native plants. All testified that the placement and maintenance of the proposed solid pier would likely increase the chances that EWM would establish and grow inside the protected area of the pier.

Drs. Nichols and Gerber agreed that the amount of EWM that would be likely to establish itself in the pier would not be great, and that it could be managed by hand-harvesting done on an annual basis.

DNR Lakeshore Team Supervisor Ron Fassbender testified that it would be difficult to enforce a permit condition requiring hand-harvesting of EWM. Specifically, Fassbender testified that the DNR does not have sufficient funding or staffing to enforce a permit condition requiring hand-harvesting of EWM.

However, Mr. Davis stated at hearing that he would be willing to hire an aquatic biologist, on at least an annual basis, to systematically remove EWM plants that established themselves within the pier. Dr. Nichols, a full professor of environmental science at the U.W. Extension, was called by the DNR. Dr. Nichols opined that hand-harvesting would be practical under the circumstances and would only be required once per year. Dr. Nichols opined, further, that there was not a significant risk that hand-harvesting would contribute to proliferation of EWM. The testimony of Drs. Gerber and Nichols was persuasive that hand-harvesting, undertaken by diving made by a qualified biologist, would control the proliferation of EWM at the project site.

Further, a permit condition requiring an affidavit that such hand-harvesting had been accomplished by a qualified professional acceptable to the DNR would be protective of direct, on-site concerns about the proliferation of EWM. Such a condition would need to be enforceable against any successors in interest of the permit applicants.

12. The DNR expressed concerns that the sheltered area inside the pier would provide improved habitat for zebra mussels, particularly on the steel sheeting and culvert surfaces. (Martin) Habitat would be improved for this undesirable exotic species because the still, sheltered area would not be subject to the current high-energy wind and wave action. (Kaster, Martin) Further, dredging would result in an increased water depth near shore, and shade from the pier, both of which zebra mussels would find more suitable.

DNR Water Resource Specialist Ron Martin is a leading authority on zebra mussels in the state and has represented Wisconsin at numerous conferences on aquatic nuisance species. Martin opined that placement of the solid pier structure would likely result in an increase in zebra mussel habitat and populations and would likely take away habitat for other macroinvertebrate species. This was confirmed by observations of existing solid piers in the area. (Ex. 140) In particular, the culverts represented ideal habitat for zebra mussels. Martin testified that the State of Wisconsin has made a significant effort to control the proliferation of zebra mussels. At present, only a very small portion of waters, less than one percent, are infested with this exotic nuisance species. (Martin) Martin opined that the permit application should be denied because the DNR should not knowingly create conditions for the proliferation of zebra mussels. Further, there would be detrimental cumulative impacts from approval of related permits for solid piers which create ideal habitat for this nuisance species which the state has made considerable efforts and expenditure to control and prevent.

Dr. Kaster opined that zebra mussels would be likely to colonize within the inside of the solid pier structure. However, Kaster argued 1.) that placement of the pier would not add to the overall zebra mussel population in Green Bay, which he believed had stabilized and ; 2.) even if there were such an increase, that it would benefit the local economy by giving work to divers. (Kaster) Kaster, while highly knowledgeable about the life history of zebra mussels, was far too sanguine about the potential detrimental impact on the public waters of the state of an increase in zebra mussel habitat. Yet in a patent application which he drafted himself, Dr. Kaster very clearly set forth the explosive growth and costs of this exotic nuisance species.

"It is now widely accepted that the zebra mussel has spread to all of the Great Lakes and will eventually inhabit more of the continent's freshwater areas unless a control can be found. The mussels present a problem because they clog water intake areas and equipment, diminishing water flow. It has been estimated that the mollusk could cost the Great Lakes Basin \$500 million a year. This problem will continue to expand as the mussel continues to extend its range in estuaries and rivers contiguous with the Great Lakes and elsewhere. The zebra mussel infestation in both estuarine and riverine systems appears to be following the same explosive growth pattern as was evidenced in Lake Erie and other Great Lakes." "Displacement of zebra mussels," (U.S. patent 5, 893, 233, April 4, 1999) Cited at hearing by Mr. Saperstein and in his brief at p. 4.

The ALJ found Mr. Martin, long actively involved in state, national and international efforts to control zebra mussels, to be more credible and persuasive than Dr. Kaster's opinions as expressed at hearing. While Dr. Kaster's views may have evolved since his 1999 patent application, the views expressed in the patent application better reflect the state of the science relating to concerns about this aquatic nuisance species. Further, there was no proof that zebra mussel populations have stabilized in the bay. The employment of divers is an off-shore impact not relevant to a determination of the public interest in the public waters of the state. See: WED v. DNR, 115 Wis. 2d 381, 340 N.W.2d 722 (1983)

Placement of the solid pier structure would have detrimental direct and cumulative impacts on longstanding efforts to control the proliferation of zebra mussels, a harmful nuisance species, in the public waters of the state.

13. Related to concerns about zebra mussels are concerns that the solid pier would alter the diversity and type of macroinvertebrates. The existing population reflects the high-energy wind and wave conditions at the site. DNR Surface Water Biologist Tim Rasman testified that there was currently an "astounding" diversity of macroinvertebrates at the Davis site. ". . . The large boulder material, what we saw is good for the invertebrate life. Those are the bugs that the fish feed on and everything else. A lot of that rock material would be filled in with a lot of the finer material and actually reduce habitat for that type of aquatic life." (Ex. 12, p. 23)

However, Dr. Jerry Kaster, Associate Professor at U.W. Milwaukee, testified on behalf of the applicants. Kaster undertook a preliminary investigation to compare macroinvertebrate life in areas where solid piers had been placed and in non-pier areas. His report concluded, there was a slight increase in abundance and taxa richness of macroinvertebrates at pier sites compared with non-pier sites. (Ex. 105, p. 8) "However," Dr. Kaster concluded, "I consider that the small differences are not significant, that is, no impact between the pier site and non-pier site." (Id.)

Further, a preliminary DNR study of macroinvertebrates on Green Bay was not able to establish that there was either a positive or negative impact on macroinvertebrate populations from placement of solid pier structures. (Ex. 75, p. 2)

Accordingly, the applicants have carried their burden of demonstrating that there would not be a detrimental impact on macroinvertebrate populations.

14. The proposed solid pier is one of a series of applications for similar structures on the bed of Green Bay. In 1997, in connection with preparation of an Environmental Assessment, the DNR reviewed aerial photos and determined that there were 309 solid structures, 40 marinas and 529 temporary structures on the bed of Green Bay in Door, Kewaunee, and Brown Counties. (Ex. 45) The EA was conducted in connection with 12 separate applications for solid pier structures in 1995 and 1996. Since the EA was drafted, more than a dozen new solid pier applications have been submitted to the DNR. (Dupperault)

Dr. Martin Jennings testified persuasively about detrimental cumulative impacts relating to the proliferation of solid piers. Jennings opined that a proliferation of solid piers would have a detrimental cumulative impact upon overall species richness. This would be due to the "stilling" effect, the loss of certain macroinvertebrates, the likelihood of sedimentation and the placement of steel sheeting in high-energy areas now dominated by natural rock cobble features. The applicants' expert, Dr. Jerry Kaster, argued that the placement of riprap and the "stilling effect" would raise species richness in the localized area around the pier. However, the riprap would be placed in an area that already has largely boulder, and rock-cobble natural features. More fundamentally, while there may be a localized impact of increased species richness, the overall

cumulative impact would be a reduction in diverse habitat, and thus a net loss of species richness on a larger scale. (Jennings)

Dr. Jennings' paper on the subject, which even Dr. Kaster praised as excellent, represents significant scientific proof of the detrimental cumulative impacts of the placement of numerous pier structures. As Dr. Jennings writes, . . . "(A) common perception of the public is that impacts of habitat alteration should be evaluated on a site by site basis, whereas biological attributes may be more appropriately measured at larger spatial scales. Although riprap may increase structural complexity at the scale of the individual site, when viewed at the scale of the whole lake, conversion of the entire shoreline to this one habitat type does not increase overall habitat diversity; rather, it causes a reduction. Because of this reduction of habitat diversity, conversion of unaltered shoreline to riprap should not be viewed as enhancement. However, when erosion control is a necessity, riprap appears to provide beneficial fish habitat compared with retaining walls." (Ex. 111, p. 24) While this statement specifically relates to riprap, the point is the same for solid piers in general, particularly projects like the instant application, which involves placement of a significant amount of riprap.

Further, this last point is of particular concern because of the large-scale detrimental cumulative impacts of an increase in invasive exotic species, such as EWM and zebra mussels. As Dr. Engel testified, "One more solid pier, one more (stilling) area for exotics to colonize, can add up to a big loss." (See Also: Ex. 150)

Both Jennings and Engel were persuasive that the cumulative impact of the placement of numerous solid piers along the shoreline of Green Bay would be a significant threat to not just overall species richness, but also overall biologic community stability and integrity. Approval of this permit application would have detrimental cumulative impacts on preserving the overall ecological integrity and stability of nearshore areas on Green Bay.

15. The structures will cause environmental pollution as defined in sec. 281.01(10), Stats. The blockage of wave action and long shore littoral currents, and the likely build-up of sediment described in Finding #10 above would have a detrimental impact upon water quality in the nearshore area of Green Bay.

16. Given that the purpose of the proposed dredging is to moor the applicants' boat, and that the solid pier must be denied as being detrimental to public rights, the proposed dredging is not consistent with public rights in the public waters of Green Bay.

17. The DNR has complied with NR 150 relating to the WEPA review process.

## DISCUSSION

After a lengthy and contentious hearing, the record reveals a close case. The applicant argues that he has met the statutory standards for permit issuance and that the DNR's objections are based upon a Department preference that "the area of shoreline owned by the applicant



remains undeveloped. (Applicants' Briefs, p. 6) The applicants assert that the objection represents a new "no-impact" standard that is different from previous Department practices. (Id. P. 7)

However, pursuant to sec. 30.12(2), Stats., the decision on the pier permit application is a de novo review by the Division, and the Division decision becomes the DNR's final decision if it is not appealed by the DNR. Sea View Estates Beach Club v. DNR, 223 Wis. 2d 138, 146-147, 588 N.W. 2d 667 (Wis. Ct. App. 1998) review denied, 225 Wis. 2d 489, 594 N.W. 2d 383 (1999) Applying the statutory standards, the applicants have not demonstrated that placement of the solid pier would be "not detrimental" to the public interest in preventing an accumulation of sediment, and an increase in habitat for zebra mussels and other aquatic nuisance species. (See: Findings 10, 12 & 15 above)

Further, the denial of the permit in this instance is based in large part upon the longstanding common law principle that the DNR must consider the detrimental cumulative impacts of many small projects on the public waters of the state. Sterlingworth Condominium Assn. V. DNR, 205 Wis. 2d 710, 721-22, 556 N.W. 2d 791 (Wis. Ct. App. 1996)

This principle was eloquently articulated by the Wisconsin Supreme Court as early as 1966:

There are over 9,000 navigable lakes in Wisconsin covering an area of over 54,000 square miles. A little fill here and there may seem to be nothing to become excited about. But one fill, though comparatively inconsequential, may lead to another, and another, and before long a great body of water may be eaten away until it may no longer exist. Our navigable waters are a precious natural heritage; once gone, they disappear forever. Hixon v. PSC, 32 Wis. 2d 608, 619, 146 N.W. 2d 577 (1966)

The principle of a relatively minor detrimental local impact giving rise to more significant larger-scale concerns was recently restated as appropriate to DNR consideration of pier permit applications.

In Sterlingworth, the Wisconsin Court of Appeals held as follows:

Although nine additional boat slips may seem inconsequential to a proprietor such as Sterlingworth, we approach it differently. Whether it is one, nine or ninety boat slips, each slip allows one more boat which inevitably risks further damage to the environment and impairs the public's interest in the lakes. The potential ecological impacts include direct impacts on water quality and sediment quality alteration, as well as direct and indirect influences on flora and fauna. For this very reason, the consideration of "cumulative impact" must be taken into account. Sterlingworth, at p. 205 Wis. 2d 721-722

Accordingly, the DNR appropriately considered not just the immediate local impacts of placement of one solid pier structure but also considered the larger-scale impacts of many similar applications. There is nothing "new" in this standard, nor does it deviate from past Department practice. The DNR would be derelict in its legislatively assigned duties to protect and preserve the public waters of the state if it failed to do so. *Id.*, p. 722 The record was clear that there were numerous likely detrimental environmental consequences from permanently altering the natural shoreline by means of placement of solid pier structures. A high-energy near-shore area would become still, would experience sedimentation and would create better habitat for exotic nuisance species, including EWM and zebra mussels. This public detriment must be balanced with the rights of the applicants as riparian owners.

The applicants can continue to place a temporary pier and gain access to the waters of the Bay. However, if their shoreline remains a natural, high-energy area, they will have to moor their boat elsewhere. The law recognizes no absolute right to park a boat in one's riparian zone. Rather, the common law recognizes the rights of a riparian "to reach navigable water, to have reasonable ingress and egress to navigable waters, and to have reasonable access for bathing and swimming." Godfrey v. Copardo, 164 Wis. 2d 352, 374, 474 N.W. 2d 786, 796 (Wis. Ct. App. 1991), cited with approval Borsellino v. DNR, stip opinion, 1999 WL 1244282, p. 4)

In considering requests for a permit under sec. 30.12(2), Stats., it is "necessary" to "balance" the rights of riparian owners with the rights of public in public waters subject to the public trust doctrine. Sea View Estates Beach Club v. DNR, 223 Wis. 2d. 138, 157, 588 N.W. 2d 667 (Wis. Ct. App. 1998) Unlike many of the other permits cited by the applicants, there is no benefit to the public from permanently placing a solid pier at the Davis site. There is instead a significant likelihood of the accumulation of sediment, for an increase in zebra mussels, and EWM. Further, approval of this solid pier, would likely be viewed as reason to approve "another, and another" in the language of the Wisconsin Supreme Court in Hixon, *Id.*

The applicants argue that the DNR has approved other solid piers, and that denial of the instant permit application by the Division would thereby deny them equal protection of the law. The Division does not have the authority to address the constitutional issues raised by the applicants. As the Wisconsin Supreme Court held in Omernick v. DNR, 100 Wis. 2d 234, 248, 301 N.W.2d 437, 444, *cert. denied*, 454 U.S. 883 (1981), constitutional issues must be raised before an administrative agency even if the agency lacks the power to resolve them. The parties to an administrative proceeding must not only raise constitutional issues before the agency but "all efforts should be directed toward developing a record that is as complete as possible in order to facilitate subsequent judicial review of the record under [sec. 227.57, Stats.]." See Also: Kuechmann v. La Crosse School District, 170 Wis. 2d 218, 225, 487 N.W.2d 639 (Wis. Ct. App. 1992)

The Division accordingly allowed the applicants to develop a record on this issue. With respect to permits granted by the Division, it is important to note again that the applicants can gain reasonable access by placing a temporary pier at the site. Further, unlike other public marina or ferry-line piers, the solid pier provides no public benefit. (See: Exs. 25-27; 145)

Finally, the Division considers each permit request based upon the record developed at hearing. The evidence in this case favors denial on the grounds described above.

Based upon the evidence taken as a whole, the balancing clearly favors denial of the permit application as being detrimental to the public interest. There would be direct and cumulative detrimental impacts upon the public interest in protecting and preserving this and other near-shore areas of Green Bay.

### CONCLUSIONS OF LAW


1. The Division of Hearings and Appeals has authority under secs. 30.12 and 227.43(1)(b), Stats., and in accordance with the foregoing Findings of Fact, to issue or deny a permit for the construction and maintenance of said structure to the conditions specified.
  2. The applicants are riparian owners within the meaning of sec. 30.12, Stats.
  3. The proposed facility described in the Findings of Fact constitutes a structure within the meaning of sec. 30.12, Stats.
  4. Specific structures may be determined to be "detrimental to the public interest" within the meaning of sec. 30.12(2), Stats., on the ground that they may impair natural beauty. This is a proper basis for denial of a permit. Claflin v. DNR, 58 Wis. 2d 182, 206 N.W.2d 392 (1973). The proposed project would not be detrimental to the public interest in natural scenic beauty.
  5. The applicant for a Chapter 30, Stats., permit has the burden of proof that the project will meet the standards in sec. 30.12(2), Stats., Village of Menomonee Falls v. DNR, 140 Wis. 2d 579, 605, N.W.2d 505 (Wis. Ct. App. 1987).
- There would be direct detrimental impacts at the project site if the proposed solid pier were permanently placed at the site. (See: Findings 10, 12 & 15 above)
6. The DNR must consider the "cumulative impacts" of many small projects on the public waters of the state. Sterlingworth Condominium Ass'n v. DNR, 205 Wis. 2d 710, 721-22, 556 N.W.2d 791 (Wis. Ct. App. 1996) Citing Hixon v. PSC, 32 Wis. 2d 608, 631-32, 146 N.W.2d 577, 589 (1966) There would be detrimental cumulative impacts to the public interest in navigable waters if there were a proliferation of solid piers on the bed of Green Bay.
  7. Pursuant to sec. 30.20(2), Stats., a contract to remove material from the bed of a lake may be issued whenever the proposed dredging is consistent with public rights. The applicant has the burden of proof to show that the proposed dredging is consistent with public rights. As set forth in the findings of fact, the applicants have not satisfied this burden.

8. The proposed dredging is a type IV action pursuant to sec. NR 150.03(5)(8)(f)1.e., Wis. Admin. Code. Pursuant to sec. NR 150.01(b), Wis. Admin. Code, a type IV action does not require the preparation of an Environmental Assessment or Environmental Impact Statement.

9. The project is a type III action under sec. NR 150.03(8)(f)4, Wis. Adm. Code. Type III actions do not require the preparation of a formal environmental impact assessment. The DNR prepared an environment assessment in connection with this and related solid pier applications.

Dated at Madison, Wisconsin on March 17, 2000.

STATE OF WISCONSIN  
DIVISION OF HEARINGS AND APPEALS  
5005 University Avenue, Suite 201  
Madison, Wisconsin 53705  
Telephone: (608) 266-7709  
FAX: (608) 264-9885

By:   
JEFFREY D. BOLDT  
ADMINISTRATIVE LAW JUDGE

## NOTICE

Set out below is a list of alternative methods available to persons who may desire to obtain review of the attached decision of the Administrative Law Judge. This notice is provided to insure compliance with sec. 227.48, Stats., and sets out the rights of any party to this proceeding to petition for rehearing and administrative or judicial review of an adverse decision.

1. Any party to this proceeding adversely affected by the decision attached hereto has the right within twenty (20) days after entry of the decision, to petition the secretary of the Department of Natural Resources for review of the decision as provided by Wisconsin Administrative Code NR 2.20. A petition for review under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
2. Any person aggrieved by the attached order may within twenty (20) days after service of such order or decision file with the Department of Natural Resources a written petition for rehearing pursuant to sec. 227.49, Stats. Rehearing may only be granted for those reasons set out in sec. 227.49(3), Stats. A petition under this section is not a prerequisite for judicial review under secs. 227.52 and 227.53, Stats.
3. Any person aggrieved by the attached decision which adversely affects the substantial interests of such person by action or inaction, affirmative or negative in form is entitled to judicial review by filing a petition therefor in accordance with the provisions of sec. 227.52 and 227.53, Stats. Said petition must be filed within thirty (30) days after service of the agency decision sought to be reviewed. If a rehearing is requested as noted in paragraph (2) above, any party seeking judicial review shall serve and file a petition for review within thirty (30) days after service of the order disposing of the rehearing application or within thirty (30) days after final disposition by operation of law. Since the decision of the Administrative Law Judge in the attached order is by law a decision of the Department of Natural Resources, any petition for judicial review shall name the Department of Natural Resources as the respondent. *Persons desiring to file for judicial review are advised to closely examine all provisions of secs. 227.52 and 227.53, Stats., to insure strict compliance with all its requirements.*